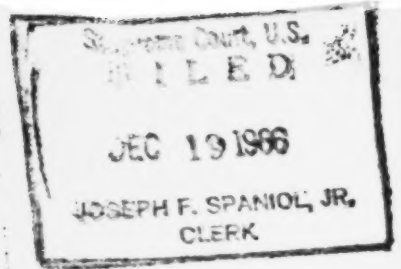


86 - 1012



No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

JERRY RUTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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13777



i.

QUESTIONS PRESENTED FOR REVIEW

I.

WERE THE GOVERNMENT LAWYER'S IMPROPER, PREJUDICIAL, AND INFLAMMATORY REMARKS DELIVERED IN HIS CLOSING ARGUMENT AND PERMITTED OVER THE OBJECTION OF THE PETITIONER'S TRIAL COUNSEL REVERSIBLE ERROR?

DID THE REMARKS INFRINGE ON A NUMBER OF CONSTITUTIONAL GUARANTEES WHERE THE REMARKS WERE NOT ACCIDENTAL BUT CALCULATED FOR THEIR PREJUDICIAL AND INFLAMMATORY CONTENT AND WHERE THE TRIAL COURT WAS FOREWARNED BY PETITIONER'S TRIAL COUNSEL BY WAY OF A MOTION IN LIMINE AND BY OBJECTION PRIOR TO THE REMARKS AND YET THE TRIAL COURT ALLOWED THE IMPROPER REMARKS TO REACH THE JURY?

DID THE TOTALITY OF THE REMARKS AFFECT AND DISTRACT THE JURY AND DENY THE PETITIONER HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL?

II.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR, WHEN OVER THE OBJECTION OF PETITIONER'S TRIAL COUNSEL, THE COURT ADMITTED INTO EVIDENCE ALMOST THE ENTIRETY OF A TAPE RECORDING AND TRANSCRIPT AND ALLOWED THE JURY TO USE AS AN AID THE TRANSCRIPT OF SAID TAPE RECORDING, WHERE PETITIONER HAD SOUGHT TO HAVE DELETED MUCH OF THE TAPES IRRELEVANT AND INFLAMMATORY CONTENT BY WAY OF MOTION IN LIMINE TO THE COURT?

ii.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHERE THE TRIAL COURT FAILED TO RULE INADMISSIBLE SEVERAL SEXUAL REFERENCES HIGHLY INFLAMMATORY AND PREJUDICIAL AND LACKING RELEVANCE WHEN IT PLAYED THE TAPED CONVERSATION TO THE JURY WHERE SAID CONVERSATION OF PETITIONER HAD ABSOLUTELY NOTHING TO DO WITH THE DRUG CHARGES CONTAINED IN THE INDICTMENT?

WHETHER THE COURT FURTHER ABUSED IT'S DISCRETION AND MADE ERRONEOUS EVIDENTIARY RULINGS WHICH PREJUDICED THE PETITIONER AND DENIED PETITIONER A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION AND A NEW TRIAL AND FURTHER CONSTITUTES HARMFUL ERROR PER SE?

LIST OF PARTIES

The parties in this proceeding in the United States Circuit Court of Appeals were as follows:

1. JAMES FRANCIS BARNARD, JR.,
Defendant-Appellant.
2. MICHAEL GEORGE PALMER, Defendant-
Appellant.
3. JERRY RUTH, Defendant- Appellant.
4. UNITED STATES OF AMERICA,
Plaintiff-Appellee.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i,ii
List of Parties	iii
Index of Authorities	v,vi
Opinions and Orders Below	2
Jurisdiction	2
Statement of the Case	3
Reasons for Allowance of the Writ	9
Argument:	

I. THIS SECTION OF PETITIONER'S REASONS FOR ALLOWANCE OF WRIT CENTER ON THE IMPROPER, PREJUDICIAL, AND INFLAMMATORY REMARKS MADE DURING THE PROSECUTOR'S CLOSING ARGUMENT THAT INFRINGED AND IMPACTED AGAINST THE PETITIONER RUTH IN NUMEROUS WAYS:

1. THE CLOSING REMARKS OF THE GOVERNMENT PROSECUTOR DENIED TO THE PETITIONER A FAIR AND IMPARTIAL TRIAL AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES UNDER THE FIFTH AMENDMENT.

v.

2. THE COMMENTS MADE FURTHER INFRINGE UPON THE PETITIONER'S RIGHT UNDER THE SIXTH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL.

3. THE COMMENTS WERE DELIBERATELY CALCULATED TO INFLAME THE JURY WERE EXTENSIVE AND NON ACCIDENTAL AND WERE MADE AFTER GOVERNMENT'S COUNSEL SAID HE WOULD NOT LINK THEM BY ARGUMENT TO PETITIONER'S CHARGED GUILT..... 9

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR, WHEN OVER PETITIONER'S OBJECTIONS, IT ADMITTED INTO EVIDENCE SUBSTANTIAL PORTIONS OF IRRELEVANT EVIDENCE CONSISTING OF THE TAPE RECORDED CONVERSATION OF THE PETITIONER WHICH WERE HIGHLY INFLAMMATORY AND CONTAINED SEVERAL EXPLICIT SEXUAL REFERENCES. THE ERROR IS HARMFUL PER SE. THE COURT ABUSED IT'S DISCRETION AND THE CONVERSATIONS SEVERELY PREJUDICED THE PETITIONER DENYING HIM A FAIR TRIAL 22

Conclusion 29

Appendix A -- Text of Statutes

Involved A-2

- Appendix B -- Memorandum of the United
States Court of Appeals
for the Ninth Circuit A-3
- Appendix C -- Order Denying
Petitioners' Motion for
a Hearing En Banc
and/or Suggetion for
Rehearing En Banc and
amendment to Memorandum
of July 25, 1986 A-18
- Appendix D -- Order for Stay of
Mandate of the United
States Court of Appeals
for the Ninth Circuit A-20
- Appendix E -- Indictment A-22
- Appendix F -- Taped Conversation between
Carolyn Pingatore Holmes
and James (Jerry) Arnold
Ruth dated April 11, 1983
at 9:15 p.m. A-72

INDEX OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Berger v. United States,</u> 295 U.S. 78 (1935).....	10
<u>Bruno v. Rushen,</u> 721 F.2d 1193 (9th Cir. 1983)..	14,15,18
<u>Cohen v. Papke,</u> 655 F.2d 191 (9th Cir. 1981).....	24,25
<u>United States v. Bear Ribs,</u> 722 F.2d 420 (8th Cir. 1983).....	28
<u>United States v. Carroll,</u> 678 F.2d 1208 (4th Cir. 1982).....	18
<u>United States v. Marvin,</u> 720 F.2d 12 (8th Cir. 1983).....	28
<u>United States v. McDonald,</u> 620 F.2d 559 (5th Cir. 1980).....	18
<u>United States v. McManaman,</u> 606 F.2d 919 (10th Cir. 1979).....	26,28
<u>United States v. Modica,</u> 663 F.2d 1173 (2nd Cir. 1981), <u>cert. denied</u> , 456 U.S. 1989 (1981)...	11

United States v. Prescott,
581 F.2d 1343 (9th Cir. 1978).. 16,17,25

Ware v. Reed,
709 F.2d 345 (5th Cir. 1983)..... 28

STATUTES:

U.S. CONST. AM. 5..... 12,17,18

U.S. CONST. AM. 6..... 12,17,18

21 U.S.C. §841(a)(1)..... 3

21 U.S.C. §846..... 3

28 U.S.C. §1254(1)..... 3

OTHER AUTHORITIES:

Fed. R. Crim. P. 29..... 9

Fed. R. Crim. P. 29(c)..... 8

Fed. R. Evid. 401..... 22

Fed. R. Evid. 402..... 23

Fed. R. Evid. 403..... 23,24,26

Fed. R. Evid. 404..... 24

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JERRY RUTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Jerry Ruth, by his attorney, Richard Paul Zipser, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Ninth Circuit filed on July 25, 1986 and further denied by petition for rehearing en banc on October 21, 1986.

OPINIONS AND ORDERS BELOW

The Judgment and Commitment Order of the United States District Court for the District of Oregon, is unreported. There is no written opinion of the United States District Court for the District of Oregon.

The Opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is set forth in Appendix B herein. The Order Denying Petitioner's Motion for a Hearing En Banc is set forth in Appendix C herein.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 25, 1986. An Order denying a Petition for Rehearing En Banc was entered on October 21, 1986 by the United States Court of Appeals for the Ninth Circuit. The time for filing a Petition for Writ of Certiorari

continues until December 20, 1986. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner Jerry Ruth was indicted along with seven other co-defendants. Specifically, the Petitioner was charged by Indictment dated April 18, 1984 with conspiracy to possess with intent to distribute cocaine, contrary to 21 U.S.C. §846. Additionally, Petitioner Ruth was charged with five counts of possession with intent to distribute cocaine, contrary to 21 U.S.C. §841(a)(1).

The case was tried to a jury. The Petitioner Ruth was tried in a joint trial with co-defendant Michael George Palmer and lead co-defendant James Francis Barnard, Jr. Ruth was found guilty on all counts. Ruth was sentenced on June 10, 1985.

During the course of the trial, no physical evidence of drugs associated with the Petitioner Ruth was offered by the government. The government's theory was that from a time prior to September 10, 1980 continuing until the time of the Indictment, that a conspiracy to distribute cocaine and the distribution of cocaine took place within the District of Oregon. The Government presented evidence by way of a limited number of witnesses that Ruth had caused money to be delivered to the Defendant Barnard for payment of cocaine and that Ruth had delivered cocaine and had distributed it. The witnesses presented against Ruth predominantly centered around two individuals who said they had brought cocaine to Ruth's residence and a third individual, one Carolyn Pingatore Holmes. She testified during the trial and the government played a lengthy tape recording made while Mrs. Holmes was

wearing a government microphone. The tape recording was relied on heavily by the government as evidence against Ruth. The tape recording became the compelling argument offered by the government in it's closing and summation to the jury.

During the course of the trial, Petitioner's trial counsel rose to object to certain portions of the tape recording having been played to jury. In the form of a Motion in Limine, Petitioner's trial counsel sought to have removed from the jury's consideration, inflammatory content, and sexual references that had absolutely nothing to do with the drug charges contained in the Indictment.

At the trial, as previously stated, motions were made concerning the content of the tape recording. The Court heard objections by various counsel. The Court did some minor editing of the version of the tape

before it was played before the jury. A transcript accompanying the tape was given to the jury and also edited in accordance with the Court's rulings. However, the vast majority of the tape was played to the jury. Contained in the Appendix of this Writ of Certiorari are several, but certainly not all of the tape recorded remarks that were allowed to be heard by the jury that had no relevance to the charges before the Court. The Petitioner could think of no other way of presenting this material to this Honorable United States Supreme Court than by providing portions of the Excerpt of Record in the Appendix that exemplify the irrelevant foul language and sexual discussions heard by the jury and permitted to be heard by the jury over the objection of Petitioner's trial counsel.

The Petitioner made over fifty objections to various portions of the tape recording and transcript. The government was willing to agree during the trial to a few objections to the tape, but to the vast majority of objections, they did not agree.

The trial court expressed it's displeasure with Petitioner's trial counsel in terms of the lateness of the motion to limit the tape. The government concurred with counsel that Mrs. Holmes was not a co-conspirator at the time of the making of the tape, but an informant.

Objections to the tape recording and the transcript of the tape recording involved sexual material contained in the tape recording; portions of inaudibility has adopted as being affirmative responses to the informant Holmes remarks; several statements not having anything to do with the co-conspirator exception to the hearsay rule;

and the remarks of the Petitioner that were contained on the tape indicating he was going to take full advantage of his Constitutional rights to due process of law as being argued by the government as evidence of Petitioner's guilt.

The trial court took the motions under consideration and rendered it's opinion. The Court did not strike the majority of the non-relevant sexual material that pervades the entirety of the tape and transcript. The Court refused to strike the remarks of Petitioner Ruth, that he was going to avail himself of his entire rights in full and fight all the way.

The jury found Petitioner guilty as to all counts. Post trial motions were filed pursuant to Federal Rule of Criminal Procedure 29(c). Further, at the close of the government's case, the Petitioner's trial counsel also made the appropriate motions

with regard to Federal Rule of Criminal Procedure 29. With regard to post trial motions, Petitioner's trial counsel again raised as error issues regarding the tape recording and closing remarks of the government lawyer. The Petitioner was sentenced to eight years in prison. On appeal, Ruth raised several assignments of error.

On July 25, 1986 the United States Court of Appeals for the Ninth Circuit affirmed the conviction of Ruth as to all counts. A Petition for Rehearing En Banc was denied as well. (App. C)

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS SECTION OF PETITIONER'S REASONS FOR ALLOWANCE OF WRIT CENTER ON THE IMPROPER, PREJUDICIAL AND INFLAMMATORY REMARKS MADE DURING THE PROSECUTOR'S CLOSING ARGUMENT THAT INFRINGED AND IMPACTED AGAINST THE PETITIONER RUTH IN NUMEROUS WAYS:

1. THE CLOSING REMARKS OF THE GOVERNMENT PROSECUTOR DENIED TO THE PETITIONER A FAIR AND IMPARTIAL TRIAL AS GUARANTEED UNDER THE CONSTITUTION OF THE UNITED STATES UNDER THE FIFTH AMENDMENT.

2. THE COMMENTS MADE FURTHER INFRINGE UPON THE PETITIONER'S RIGHT UNDER THE SIXTH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL.

3. THE COMMENTS WERE DELIBERATELY CALCULATED TO INFLAME THE JURY WERE EXTENSIVE AND NON ACCIDENTAL AND WERE MADE AFTER GOVERNMENT'S COUNSEL SAID HE WOULD NOT LINK THEM BY ARGUMENT TO PETITIONER'S CHARGED GUILT.

The United State Supreme Court some fifty years ago described the unique role of the prosecutor in the criminal justice process. A prosecutor is under special restraints inherent in his particular role in the criminal justice process. Berger v. United States, 295 U.S. 78 (1935). "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring one". Berger v. United States, 295 U.S. at 80. Improper commentary by a prosecutor in closing argument

establishes a great likelihood to have a substantial effect on the jury. Jurors are armed with the knowledge that prosecutors prepare and present cases and consequence of such knowledge is an inference that prosecutor's have a complete access to facts central to the government's prosecution and investigation. Where the remarks are made in closing argument, they have a great likelihood of substantial affect upon a jury and it's deliberation. e.g. United States v. Modica, 663 F.2d 1173 (2nd Cir. 1981), cert. denied, 456 U.S. 1989 (1981).

Petitioner's trial counsel objected to certain portions of a tape recording being played to the jury. Petitioner's trial counsel voiced his concern that the prosecutor would use certain portions of the tape and link them to improper closing argument. The remarks of the prosecutor in closing argument were not relevant. The

government claimed Petitioner Ruth was guilty because of the Petitioner's assertion in earthy language on the tape that he intended to avail himself of his full rights under the United States Constitution guaranteed to him both under the Fifth and Sixth Amendments.

The government's lawyer in his closing remarks to the jury indeed argued that the Petitioner's exercise of his right to trial supported the government's claim that the Petitioner was guilty. Government counsel began by saying to the jury, "ladies and gentlemen, once again the answer is provided by the Defendant Ruth in his own statements you will recall what he said ...". Petitioner's counsel immediately objected:

"I'm going to object to anything other than my client having an absolute right to go to trial as is constitutionally guaranteed, suggests counsel would be making improper argument if he argues any other way."

Government counsel said he was not going to argue that position. It is a fair interpretation that the Court overruled the Petitioner's trial counsel's objection based on the government's assurance. The prosecutor did exactly what he said he was not going to do. Quoting the comments on the tape, the government lawyer urged them upon the jury as evidence of Ruth's guilt:

"First of all, I am not going to roll over. I am going to fight this thing to the end. I will fight this mother fucker to the last day. So you know, there will be no guilty pleas on this side; see, I think Barnard is much the same way. So they are a long ways from a fucking conviction and even a prosecution and even a warrant being served you know, for the time being it's ok; it might get worse".

Counsel for the government also argued that the defense counsel were trying to confuse the jury. The trial court's later remarks to the jury were an ineffective

exercise in trying to dissipate the error. The trial court informed the jury that the defendants were not trying to confuse them. The trial court also informed the jury there is nothing wrong with a person deciding they are not going to "roll over" or they are not guilty, or they are going to make the government prove their guilt. Petitioner's trial counsel moved for a mistrial. The Court denied the Motion for Mistrial.

A number of courts have confronted the issue of improper remarks made by a government lawyer directly bearing on the rights of a defendant to contest the charges leveled against him. Convictions are reversed because such improper remarks go to the heart of the criminal justice system. See Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983). The government attorney has an absolute duty to refrain from improper remarks calculated to produce a wrongful

conviction. Where prosecutor's comments focus on a defendant's constitutional right to counsel and the comments made by the government lawyer are not accidental, but calculated to wrongfully impute guilt to a defendant, such activity is not harmless error. The burden upon the government to establish that the error was harmless beyond a reasonable doubt. 721 F.2d at 1195. The hiring of an attorney argued by a government lawyer in closing argument as probative of a defendant's guilt, is reversible error. 721 F.2d at 1194. The Ninth Circuit has stated in earlier decisions that such conduct impermissibly strikes at the very fundamental due process protections applicable to insure an inherent fairness in our adversarial system of criminal justice. 721 F.2d 1195.

The government sought to impute guilt to Petitioner because he availed himself of his constitutional rights not only to counsel,

but to a full and complete trial. Government counsel argued that this should give rise to Petitioner's conviction. The remarks were not withdrawn upon objection, but instead, government counsel said he was not going to argue the theory to the jury. He then went right ahead and argued the theory to the jury. The remarks were calculated to impute guilt to the Petitioner Ruth. They denied to the Petitioner's most fundamental right of fair trial.

In United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), the Ninth Circuit held that the introduction of improper evidence and improper comment by a government lawyer required reversal. It was no crime for a citizen to refuse entry to a law enforcement officer who does not have an appropriate warrant. The Court held that where the government argued that such action imputes guilt to a defendant at trial, it imposes an

unfair and impermissible burden, especially wherein a defendant has asserted a constitutional right. 581 F.2d at 1351. In the instant matter, Petitioner clearly shows that the government lawyer introduced and argued evidence for the purposes of imputing guilt to the Petitioner because of his assertion of his constitutional rights to not roll over and to avail himself of a full trial. Petitioner is penalized for asserting and exercising his constitutional right to go to trial. Such actions by the government lawyer are readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value. 581 F.2d at 1352.

In the instant matter, the Petitioner has the right under the Fifth Amendment to trial by jury and under the Sixth Amendment the right to counsel and the right to assist counsel. The remarks of the prosecutor

contained improper insinuations and assertions calculated to mislead the jury. Where the government lawyer's and his remarks violate basic constitutional rights contained in the Fifth and Sixth Amendment of the United States Constitution as in the instant matter, the Writ should be granted and the conviction reversed. United States v. Carroll, 678 F.2d 1208 (4th Cir. 1982).

Interestingly, Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) relied heavily and cites with favor United States v. McDonald, 620 F.2d 559 (5th Cir. 1980). In McDonald, the Fifth Circuit held that a government lawyer's improper comment that infers or raises the issue that a defendant is guilty simply because he chose to exercise his right to counsel is error that is harmful per se. Comments by a prosecutor that penalize the Petitioner for speaking of the right to exercise his fundamental rights strike to the

core of the defense and cannot be harmless error. There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. The calculated government misconduct, deliberate and objected to, in the instant matter was harmful per se.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, WHEN OVER PETITIONER'S OBJECTIONS, IT ADMITTED INTO EVIDENCE SUBSTANTIAL PORTIONS OF IRRELEVANT EVIDENCE CONSISTING OF THE TAPE RECORDED CONVERSATION OF THE PETITIONER WHICH WERE HIGHLY INFLAMMATORY AND CONTAINED SEVERAL EXPLICIT SEXUAL REFERENCES. THE ERROR IS HARMFUL PER SE. THE COURT ABUSED IT'S DISCRETION AND THE CONVERSATIONS SEVERELY PREJUDICED THE PETITIONER DENYING HIM A FAIR TRIAL.

Pursuant to her agreement with the Drug Enforcement Administration, Carolyn Holmes agreed to meet with the Petitioner Ruth. She met him at a hotel in the Seattle area in a lounge that served alcoholic beverages. While consuming numerous drinks, she and the Petitioner engaged in a lengthy conversation.

The conversation was tape recorded with a recording device furnished to her by the Drug Enforcement Administration. During the trial of Petitioner, motions had been made concerning the contents of the tape recording. The Court heard objections by various defense counsel. The Court did some editing of the version of the tape before it was played to the jury. However, the vast majority of the tape was played to the jury.

A hearing was held on the objections to the tape before the trial judge. This Honorable Court is provided in the Appendix Excerpts of the Record which contain portions of the transcript of the recording utilized by the jury in their determinations. This Honorable Court is asked to review these portions of the Excerpt of Record as it sets out the content of objected to evidence

admitted during the trial by the Court and provides a basis for much of the error cited to by Petitioner in this argument.

The Petitioner and co-defendants made over fifty objections to various portions of the tape and transcript.

Petitioner's counsel focused as to areas of the tape that were referred to as bad character evidence and completely lacking in relevance to the trial. Petitioner objected to the sexual material contained in the tape recording; portions of inaudibility as adopted as being affirmative responses to the informant Holmes' remarks; and Petitioner's remarks indicating the Petitioner was going to take full advantage of his constitutional rights to due process of law as being argued as evidence of Petitioner's guilt.

The trial court considered the motions and ruled upon them. It is clear that the trial court did not strike the non-relevant

sexual material that pervades the entirety of the transcript. The Court refused to strike the remarks of the Petitioner Ruth that he was going to avail himself of his entire rights and fight all the way. The Court ruled that the remarks could be construed in furtherance of the conspiracy. After the government in closing argument argued that they showed the Petitioner was guilty beyond a reasonable doubt, the trial court instructed the jury that, "there is nothing wrong with a person deciding they are not going to roll over or they or not guilty or they are going to make the government prove their guilt". See also Reasons for Allowance of Writ, I, supra.

The trial court allowed the almost wholesale admission of the tape recording and transcript. Federal Rule of Evidence 401 defines relevant evidence as, "evidence having any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". Federal Rule of Evidence 402 sets out the proposition that irrelevant evidence is inadmissible. Finally, Federal Rule of Evidence 403 holds, "although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or be considerations of undue delay, waste of time, or a needless presentation of cumulative evidence".

The tape recording and transcript put before the jury conversations concerning numerous sexual activities and profanity associated with the Petitioner. None that was relevant to the issues before the Court in the trial of the Petitioner Ruth. Certainly, Petitioner's counsel argued

admitting the evidence would be highly prejudicial. Such admission of Evidence of Ruth's past sexual experiences distracted the jury away from the issues charged in the Indictment, namely the drug conspiracy and the substantive drug counts. It improperly placed the emphasis of the character of the Petitioner Ruth before the jury. The admission of the evidence found in the tape recording and transcript, especially as to sexual references is legally unjustified and reversible error. Cohen v. Papke, 655 F.2d 191, 194 (9th Cir. 1981). F.R.E. 404. In the instant matter, the trial court abused it's discretion when it allowed in the evidence. The evidence had very slight and probably no probative value. Yet, the tendency of prejudice in the instant matter to the Petitioner was great. The invocation of F.R.E. 403 is directly on point requiring this Court to grant Certiorari and ultimately

reverse the conviction of the Petitioner. The clear holding of Cohen v. Papke, by the Ninth Circuit, supra is that introduction of evidence regarding prior sexual experiences and preferences is extremely prejudicial to the chances of the Petitioner receiving a fair consideration by the jury. 655 F.2d at 195.

United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978) held:

"Inadmissible evidence, which can readily be misinterpreted by the jury, should not be admitted just to put the relevant facts in their true setting. For the reasons stated in ..., the facts in issue are so ambiguous as to be irrelevant. Moreover, they are so readily subject to misinterpretation by a jury as to render a curative or protective instruction of dubious value". 581 F.2d at 1352.

The Petitioner claims unfair prejudice in relationship to the admission of wholesale conversations in a taped conversation.

Petitioner's counsel objected that the statements would be highly prejudicial, would raise collateral issues, and could not be cured by instruction. Further, Petitioner's counsel moved for a mistrial. The words of the Tenth Circuit in United States v. McManaman, 606 F.2d 919 (10th Cir. 1979) are directly applicable to the instant matter before this Honorable Court:

"While the small portions of the conversation touching directly on drug dealings were relevance, Rule 403 F.R.E. cautions that:

'Although relevant, evidence may be excluded if it's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence'".
606 F.2d 925-926.

The taped conversations in the instant matter are inflammatory. See Appendix F. The inflammatory talk clearly predominated in impact over the discussion of drug dealings. The probative value was far outweighed by the danger of unfair prejudice. The evidence allowed improperly by the trial court suggested to a jury that the decision should be made on an improper basis, namely that the defendant was a bad man. The prejudicial impact towards the Petitioner by allowing the jury to listen to the non-relevant sexual discussions between the Petitioner Ruth and the informant Holmes is easily seen to provoke a jury's sense of outrage or disgust or abuse with regard to personal standards of morality. Admitting such evidence inflames an instinct to punish for other than that is charged in the Indictment, namely drug dealing and drug conspiracy. Considering the record as a whole, and having had before it

the inflammatory conversations and substantial sexual conversations, the probative value substantially outweighed the danger of the unfair prejudice that the admission of the evidence allowed in by the trial court in the instant matter that resulted to the Petitioner. It requires a granting of this Writ of Certiorari by this Most Honorable Court and the ultimate reversal of the Petitioner's conviction. 606 F.2d at 926.

Courts are quick to bar the introduction of sexual misconduct even when sought to be presented by the defendant. United States v. Marvin, 720 F.2d 12 (8th Cir. 1983); United States v. Bear Ribs, 722 F.2d 420 (8th Cir. 1983). See also, Ware v. Reed, 709 F.2d 345 (5th Cir. 1983).

A reading of Appendix F herein will find that the admitted evidence was not relevant and instead inflammatory and prejudicial.

The trial court abused it's discretion in a manifest injustice has taken place. The objectivity of the jurors is prejudice by the wholesale admission of evidence that had absolutely nothing to do with the drug conspiracy. Almost the entirety of the tape recording could have been redacted and eliminated. The failure to do so by the Court was error. The Petitioner is treated as if he is a bad man as opposed to being tried on charges limited by the Indictment. His conviction should not stand. The Writ should be granted and the conviction reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition For Writ of Certiorari be granted, or in the alternative, that the Opinion and Order of the United States Court of Appeals for the

Ninth Circuit affirming Petitioner's convictions be summarily reversed, or in the alternative, that the matter be remanded for the Ninth Circuit to determine more fully the issues amplified upon review of this Court.

Respectfully submitted,

RICHARD PAUL ZIPSER & ASSOCIATES, P.C.
BY: /s/ RICHARD PAUL ZIPSER (P22747)
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DATED: December 15, 1986

A-1

APPENDICES

APPENDIX A

TEXT OF STATUTES INVOLVED

21 United States Code §841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally - to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 United States Code §846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX B

MEMORANDUM OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION
UNITES STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed July 25, 1986)

UNITED STATES OF AMERICA,	)	Nos. 85-3059
	)	85-3078
Plaintiff-Appellee,	)	85-3083
)	
vs.	)	MEMORANDUM*
)	
JAMES FRANCIS BARNARD, JR.,	)	D.C.No. 84-57-RE
MICHAEL GEORGE PALMER, and)	
JERRY RUTH,)	
)	
Defendants-Appellants.))	

Appeal from the United States District Court
for the District of Oregon
The Honorable James A. Redden,
District Judge, Presiding
Argued and Submitted July 10, 1986
Portland, Oregon

Before: GOODWIN, WALLACE, and NORRIS, Circuit
Judges

* This disposition is not appropriate for
publication and may not be cited to or by the
courts of this circuit except as provided by
9th Cir. R. 21.

Appellants Barnard, Palmer and Ruth were three of seven individuals charged in a thirty-four count indictment with drug trafficking offenses. All three were charged with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §846. In addition, each appellant was charged with possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1). Finally, Barnard was charged with attempting importation of cocaine, in violation of 21 U.S.C. §963, and distribution of cocaine in violation of 21 U.S.C. §841(a)(1).

Following a joint jury trial, all three appellants were convicted on the conspiracy count. In addition, Barnard was convicted of distribution of cocaine and eight of twelve counts of possession with the intent to

distribute. He was acquitted on three possession counts and convicted of the lesser included offense of simple possession on the final count. Palmer was also convicted on two counts of possession with intent to distribute and acquitted on a third. Ruth was convicted on all five counts of possession with intent to distribute brought against him. Appellants raise seven challenges to their convictions.

I Conspiracy Instructions.

Appellants first contend that the trial court erred in its instruction on single versus multiple conspiracies. Appellants allege that the district court's instruction strays from this course and could be interpreted as warranting the conviction of appellants for their participation in any conspiracy, not necessarily that charged in

Count I.¹ When read in its context, United States v. Abushi, 682 F.2d 1289, 1298-1300 (9th Cir. 1982) (appellate court must view the instructions as a whole), the quoted language merely makes the point that the appellants' membership in a different conspiracy did not exempt them from prosecution for their involvement in the conspiracy charged in Count I. The instructions repeatedly referred to the conspiracy "charged in Count I," and the jury was admonished that the defendants could be convicted only of those crimes specifically

1 Appellants challenge that portion of the jury charge that stated that:

"If you find that a defendant was part of a separate conspiracy or conspiracies, you may still find him guilty of the crime alleged in Count I, if, but only if, all of you are in agreement that he was a member of one particular conspiracy the object of which was to possess cocaine with the intent ot (sic) distribute it...."

charged in the indictment. Thus, the charge was well within the district court's discretion. Abushi, 682 F.2d at 1299 (trial judge's formulation of the jury charge reviewed for an abuse of discretion).

II The Motion for Severance.

Appellants' second contention is that the district court erred by refusing a defense motion to sever the trials. In order to prevail on this claim appellants must establish that, in failing to sever the trials under Fed. R. Crim. P. 14, the district court denied them a fair trial. United States v. Escalanti, 637 F.2d 1197, 1201 (9th Cir. 1980). Appellants fail to meet this burden.

Appellants contend that there was too much evidence for the jury to compartmentalize and apply to each defendant. We reject this challenge. This is a conspiracy case, and a great deal of the evidence regarding overt acts of coconspirators was admissible against the defendant. Thus, appellant Palmer vastly overstates the jury's need to compartmentalize the evidence of overt acts because the majority of that evidence was admissible against each defendant and not merely against that defendant who committed the overt act.

Moreover, even were the disparity in evidence against Barnard as compared with that against Palmer and Ruth as great as appellants suggest, appellants have failed to demonstrate the manner in which any disparity deprived them of a fair trial. Finally, the

government points out that this circuit has adopted a common-sense rule that the jury's behavior is the best evidence of its ability to compartmentalize evidence, see United States v. Rasheed, 663 F.2d 843, 855 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982), and in this case the jury was able to sift through the evidence sufficiently to render split verdicts. In light of the foregoing, we find that the district court did not abuse its discretion in denying a Motion for Severance under Fed. R. Crim. P. 14.

III Hearsay Testimony.

Appellants next contend that the district court erroneously admitted hearsay testimony under the coconspirator exception, Fed. R. Evid. 801(d)(2)(E), because the government failed to make a prima facie case

of conspiracy. Appellants first appear to challenge the method employed by the district court in evaluating the foundation for the hearsay statements. The district court admitted testimony of statements made by coconspirators subject to the connection of the declarants to the conspiracy before the close of the evidence. This procedure has been approved by this circuit. See United States v. Spawr Optical Research, Inc., 685 F.2d 1076, 1083 (9th Cir. 1982), cert. denied, 461 U.S. 905 (1983); United States v. Perez, 658 F.2d 654, 658-59 (9th Cir. 1981); United States v. Kenny, 645 F.2d 1323, 1334 (9th Cir.), cert. denied, 452 U.S. 920 (1981). Thus while a pre-trial hearing is permissible, the district court may, in its discretion, allow the government to present

hearsay testimony, subject to later connection with the conspiracy at the risk of dismissal or other penalty.²

IV Admission of the Tape Recording.

Appellant Ruth challenges the introduction of a taped conversation between Ruth and Carolyn Holmes. He contends that certain portions of the tape involve discussions of sexual matters, the introduction of which was prejudicial. Although the government admits that portions of the taped conversation have no relevance to the case, we find any error from the

2 Appellants' contention that the absence of any evidence specifically connecting Palmer with Ruth precludes the court from finding them to be members of the same conspiracy must also be rejected. See Blumenthal v. United States, 332 U.S. 539, 556-57 (1947) ("salesman" of illegal liquor derived from common source could be convicted as members of single conspiracy without knowledge of all the details of the conspiracy or the participation of others).

introduction of the tape to be harmless. Ruth cites nothing beyond the mere existence of profanity and references to sexual escapades as the basis for his contention that the evidence was prejudicial. Given the strength of the evidence against Ruth, the tapes were not sufficiently prejudicial to undermine Ruth's conviction.³ See United States v. Guerrero, 756 F.2d 1342, 1347 (9th Cir. 1984) ("When an error in the admission of evidence is not of constitutional proportions, reversal is not required unless it is more probable than not that the error materially affected the verdict.").

3 Ruth also contends that he was denied effective assistance of counsel because his trial counsel did not timely object to portions of the taped conversation between Ruth and Holmes. Given the minimal prejudice risked by the introduction of the tape, see supra, and the fact that the district court considered defendant's objections, Ruth was not prejudiced by the failure of counsel to timely object. See Strickland v. Washington, 446 U.S. 668, 691 (1984).

V The Prosecutor's Closing Argument.

In his closing argument, the prosecutor quoted Ruth's comments to Holmes in the taped conversation to the effect that he would not implicate Dan Price even if Ruth were indicted because Price was a good customer; that Ruth would not "roll over," but would instead fight the case to the last day. Ruth claims that the prosecutor's comments warranted a mistrial and therefore reversal because (1) they penalized him for expressing an intent to exercise his Constitutional right to trial, and (2) they infringed on his Fifth Amendment right not to testify.

The prosecutor's comments do not rise to the level of reversible error. Initially, the remarks made by Ruth to the effect that he would not "roll over" and implicate Price are probative of the continued existence of

the conspiracy even after the initial arrests. Ruth does not challenge the introduction of that evidence on appeal. The introduction and comment upon this evidence is thus consistent with the government's theory of the case.⁴ Further, the trial court specifically cautioned the jury that there is nothing wrong with a defendant pleading not guilty and requiring the government to prove its case beyond a reasonable doubt.

⁴ United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978), is not to the contrary. In that case, the prejudicial impact inhered in the defendant's availing herself of her Fourth Amendment rights, her passive refusal to consent to a warrantless search had no probative value and was not based upon evidence in the record. In this case, however, Ruth's statement that he would not "roll over" and implicate Price was based upon evidence in the record -- evidence that supported the government's theory that the conspiracy continued after the initial arrests.

VI Extrinsic Markings on the Indictment.

While the jury was deliberating it was discovered that the district judge had made notations on his copy of the indictment which had not been deleted before the indictment was photocopied and distributed to the jury. Appellants contend that the jury's exposure to this extrinsic material requires an evidentiary hearing to determine if that material could have influenced the jury. Appellants, however, did not request such an evidentiary hearing at trial. This tactical decision forecloses consideration of the issue on appeal unless the failure to hold an evidentiary hearing was plain error. See United States v. Kennedy, 714 F.2d 968, 976 (9th Cir. 1983), cert. denied, 104 S.Ct. 1305 (1984). The district court complied with defense requests to distribute a clean copy of the indictment and to admonish the jury

that any notes on the previously distributed copy were to be ignored. The district court did not commit plain error by failing to give the defense more than it requested.

VII The Cumulative Effect of Trial Errors.

Appellant Barnard argues that the cumulative effect of prejudicial evidence warrants reversal. Barnard does not discuss any evidence in particular nor does he attempt to establish how the introduction of specific evidence worked to his prejudice. He merely contends that "excessive" evidence of the lifestyle of his absent codefendant and partner Chavez caused Chavez to develop "mythic dimensions" in the mind of the jury. In order for the admission of probative evidence to be overturned on appeal, its admission must be found to have been an abuse

A-17

of discretion. Because Barnard has provided no basis for his claim of prejudice, we reject this claim.

AFFIRMED

APPENDIX C

ORDER DENYING PETITIONERS' MOTION
FOR A REHEARING AND/OR SUGGESTION
FOR REHEARING EN BANC

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed October 21, 1986)

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,	)	Nos. 85-3059
	)	85-3078
	)	85-3083
v.)	
)	
JAMES FRANCIS BARNARD, JR.,)	
MICHAEL GEORGE PALMER, and	)	O R D E R
JERRY RUTH,)	
)	
Defendants-Appellants.))	

BEFORE: GOODWIN, WALLACE, and NORRIS, Circuit
Judges

The Memorandum disposition in this case,
filed on July 25, 1986, is amended as
follows:

Page 7, lines 6-7":

The sentence "Ruth does not challenge the introduction of that evidence on appeal." is deleted.

The panel, as constituted above, has unanimously voted to deny the petitions for rehearing filed in case No. 85-3078 and case No. 85-3083 and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are DENIED, and the suggestions for rehearing are REJECTED.

APPENDIX D

ORDER FOR STAY OF MANDATE
OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION
UNITES STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(Filed November 19, 1986)

UNITED STATES OF AMERICA,	)	No. 85-3083
)	
Plaintiff-Appellee,)	
)	
vs.	)	O R D E R
)	
JERRY RUTH,)	
)	
Defendant-Appellant.)	

Before: NORRIS, Circuit Judge

Upon due consideration of Appellant's motion for stay of the mandate of this Court in the above cause pending the filing of a petition for writ of certiorari, such petition to be filed within 30 days of this Order,

A-21

IT IS ORDERED that the motion for stay
of mandate be GRANTED.*

Dated: November 17, 1986

* In the event that the petition for writ of
certiorari is timely filed, "the stay shall
continue until final disposition by the
Supreme Court." Fed. R. App. P. 41(b).

APPENDIX E

INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

vs.

No. CR-84-57-RE

JAMES FRANCIS BARNARD, JR.,)
 aka "Barney";)
JOSE CARLOS CHAVEZ-VERNAZA,)
aka Jose Chavez, aka "Pepe";)
MICHAEL DORY GOGAN;)
JULIO RODOLFO MORCHIO-GODOY,)
aka Julio Morchio;)
MICHAEL GEORGE PALMER;)
JERRY RUTH;)
DIEGO HORACIO ROMANI-JIMINEZ,)
aka Diego Romani;)
JAIME ALFREDO SANTOS-CHACON,)
aka Jamie Santos, aka "Chino",)
Defendants.)

I N D I C T M E N T

(21 U.S.C. 841(a)(1))
(21 U.S.C. 846)
(18 U.S.C. 2)
(21 U.S.C. 952(a))
(21 U.S.C. 963)

THE GRAND JURY CHARGES:

COUNT 1

1. That from a time prior to September 10, 1980, the exact date to the Grand Jury unknown, and continuing to and including the date of this Indictment, in the District of Oregon, and at various places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney"; JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe"; MICHAEL DORY GOGAN; JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio; MICHAEL GEORGE PALMER; JERRY RUTH; DIEGO HORACIO ROMANI-JIMENEZ, aka Diego Romani; JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendants herein, did knowingly and intentionally combine, conspire, confederate and agree together with each other and with diverse other persons whose names are to the Grand Jury known and

unknown, to possess with intent to distribute and to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. §§841(a)(1) and 846.

2. It was a part of said conspiracy for various of the defendants and co-conspirators to travel within and without the District of Oregon to transport cocaine and money.

3. It was a part of said conspiracy for various of the defendants and co-conspirators to weigh, dilute and package quantities of cocaine.

4. It was a part of said conspiracy for various of the defendants and co-conspirators to store quantities of cocaine.

5. It was a part of said conspiracy for various of the defendants and co-conspirators to maintain books and records so that a record of the amount of cocaine received, distributed and paid for would be available.

6. It was a part of said conspiracy for various of the defendants and co-conspirators to obtain, carry and utilize voice pagers to further the possession and distribution of cocaine.

7. It was a part of said conspiracy for various of the co-conspirators to give false and misleading statements to law enforcement officers to attempt to prevent the identities and roles of other co-conspirators and defendants from being discovered.

8. In furtherance of said conspiracy, and to effect the objects thereof, the defendants and co-conspirators did commit, among others the following overt acts:

OVERT ACTS

1. From September 10 to September 11, 1980, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", together with Gerry Allen

Haxton, possessed with intent to distribute approximately one (1) pound of cocaine in southeast Portland, Multnomah County, Oregon.

2. Beginning in approximately 1980, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", distributed cocaine and caused the distribution of cocaine to MICHAEL GEORGE PALMER and MICHAEL DORY GOGAN.

3. Beginning in approximately 1980, the exact date to the Grand Jury unknown, MICHAEL GEORGE PALMER and JERRY RUTH caused money to be delivered to JAMES FRANCIS BARNARD, JR., aka "Barney", in payment for cocaine.

4. During the period from approximately September 1980, through November 1980, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", demanded \$2,000 in payment from

Michael James Primiano, Jr. for cocaine he had previously furnished to Primiano in the District of Oregon.

5. In October of 1980, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", stored approximately one (1) kilogram of cocaine in the residence of Michael John Allie, located at 133 Southeast 27th Avenue, Portland, Multnomah County, Oregon.

6. During the period from approximately October 1980, through April 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", distributed cocaine and caused cocaine to be distributed to Gerry Allen Haxton at various places in the District of Oregon and the Western District of Washington.

7. During the period from approximately November 1980, through December 1980, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Daniel Vincente Pena to distribute cocaine to Michael John Allie at various locations in the District of Oregon.

8. During the period from approximately January 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused approximately one (1) pound of cocaine per week to be stored, weighed, diluted, packaged at and distributed from the residence of Michael John Allie, located at 506 Northeast Prescott, Portland, Multnomah County, Oregon.

9. In February 1981, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", and JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe",

met at the residence of CHAVEZ, located at 4450 Southwest Bernard, Lake Oswego, Clackamas County, Oregon, and discussed details of their partnership in the importation and distribution of cocaine.

10. During the period from approximately February 1981, through August 1981, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", caused John Clifford Miller to distribute cocaine to MICHAEL DORY GOGAN and MICHAEL GEORGE PALMER in the Western District of Washington.

11. During the period from approximately March 1981, through June 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", maintained safes for the storage of cocaine, drug paraphernalia and money at the residence of Michael James Primiano, Jr., located at 4540 Southwest Dogwood, Lake Oswego,

Clackamas County, Oregon, and the residence of Michael John Allie, located at 506 Northeast Prescott, Portland, Multnomah County, Oregon.

12. During the period from approximately March 1981, through June 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", employed John Frederick Percich to supervise Michael John Allie in the preparation and distribution of cocaine.

13. During the period from approximately March 1981, through June 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused John Frederick Percich to collect money owed for the previous distribution of cocaine.

14. In March or April 1981, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", directed Michael John Allie to retrieve a package of cocaine that was hidden under a sink in one of the guest rooms at the Cosmopolitan Hotel, located at 1030 Northeast Union, Portland, Multnomah County, Oregon.

15. In approximately April 1981, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Michael John Allie to distribute cocaine to Joyce Ann Haxton at Allie's residence located at 506 Northeast Prescott, Portland, Multnomah County, Oregon, and at the Alibi Restaurant, located at 4024 North Interstate, Portland, Multnomah County, Oregon.

16. In April 1981, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused John Frederick Percich to deliver \$3,000, the proceeds of cocaine distribution, to JAMES FRANCIS BARNARD, JR., aka "Barney", at BARNARD's residence located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon.

17. During the period from approximately April 1981, through June 1981, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused John Frederick Percich to collect approximately \$10,000, the proceeds of cocaine distribution, from James Worthy Calcagno at Calcagno's residence located at 2508 Lake Road, Milwaukie, Clackamas County, Oregon, and deliver it to JAMES FRANCIS

BARNARD, JR., aka "Barney", at BARNARD's residence located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon.

18. From April 19, 1981 through April 20, 1981, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Michael John Allie, John Frederick Percich, Michael James Primiano, Jr., and Brian Scott Ottenbacher, to attempt to distribute cocaine in the District of Oregon.

19. On approximately April 20, 1981, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", directed Michael John Allie to transfer all the cocaine from a safe in the residence of Michael James Primiano, Jr., located at 4540 Southwest Dogwood, Lake Oswego, Clackamas County, Oregon, to JAMES FRANCIS BARNARD, JR., aka "Barney".

20. During the period from approximately June 1981, through September 1981, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", caused John Clifford Miller to obtain cocaine from a wood pile at BARNARD's residence located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon, and distribute cocaine to Kevin John Link and MICHAEL GEORGE PALMER.

21. In approximately June 1981, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Michael John Allie to transport a total of approximately four (4) kilograms of cocaine from JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio, DIEGO HORACIO ROMANI-JIMINEZ, aka Diego Romani, and Luis Benjamin Ponce de Leon at the Hickory Stick Restaurant, located at 316 Southwest

Stark, and at the Fish Grotto Seafood Restaurant, located at 1035 Southwest Stark, Portland, Multnomah County, Oregon, to JAMES FRANCIS BARNARD, JR., aka "Barney", at his residence located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon.

22. On August 18, 1981, through August 19, 1981 JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused the distribution of cocaine at the Pepper Tree Motel near Highway 217 and Allen Boulevard, Beaverton, Washington County, Oregon, by Mardy Charles Maltais.

23. On October 8, 1981, JAMES FRANCIS BARNARD, JR., aka "Barney", caused Jerry Clifford Backer to possess cocaine with the intent to distribute in a 1976 Chevrolet pickup, Washington license PS 1162, and at his residence located at 2714 Northeast 99th, Vancouver, Clark County, Washington.

24. Beginning in approximately November, 1981, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", caused the delivery of cocaine from Portland, Multnomah County, Oregon, to JERRY RUTH in the Western District of Washington, and RUTH, caused money, the proceeds of cocaine distribution, to be sent from the Western District of Washington and delivered to BARNARD, in the District of Oregon.

25. During the period from approximately November 1981, through December 1982, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", caused Dorothy Faye Bergquist and Paul Richard Triplet, brother and sister, to distribute cocaine to MICHAEL DORY GOGAN and JERRY RUTH in the Western District of Washington.

26. In approximately March 1982, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", delivered a hydraulic press, scales, packaging materials and cocaine to Dorothy Faye Bergquist at her residence located at 3504 Northeast 25th, Portland, Multnomah County, Oregon. BARNARD instructed Dorothy Faye Bergquist how to weigh, dilute, and package cocaine for distribution.

27. During the period from approximately March 1982, through April of 1982, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", directed Michael John Allie to pick up a package of money, the proceeds of cocaine distribution, from JAMES FRANCIS BARNARD, JR., aka "Barney", and deliver the package of

money to CHAVEZ at CHAVEZ's residence located at 4450 Southwest Bernard, Lake Oswego, Clackamas County, Oregon.

28. During the period from approximately March 1982, through March, 1983, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", distributed cocaine and caused cocaine to be distributed to Jack L. Schiefelbein in the District of Oregon.

29. During the period from approximately April 1982, through June 1982, the exact dates to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Paul Richard Triplet on two (2) occasions to deliver cocaine to CHAVEZ at the River Queen Restaurant, located at 1300 Northwest Front Avenue, Portland, Multnomah County, Oregon.

30. During the period from approximately April 1982, through June 1982, the exact dates to the Grand Jury unknown, Kevin John Link telephoned Paul Richard Triplet and told Triplet to deliver money, the proceeds of cocaine distribution, to JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", at the River Queen Restaurant, located at 1300 Northwest Front Avenue, Portland, Multnomah County, Oregon.

31. On May 5, 1982, Jack L. Schiefelbein was asked by JAMES FRANCIS BARNARD, JR., aka "Barney", JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", and JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio, to write and sign a letter of introduction for MORCHIO, stating that MORCHIO was a representative of Electro West, Inc., a business owned by Schiefelbein.

32. In approximately June 1982, the exact date to the Grand Jury unknown, at the residence of JAMES FRANCIS BARNARD, JR., aka "Barney", located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon, Paul Richard Triplet assisted JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", in the removal of cocaine from a false compartment of a suitcase, and approximately three (3) days later Triplet burned the suitcase at the instruction of CHAVEZ.

33. In approximately August 1982, the exact date to the Grand Jury unknown, at the residence of JAMES FRANCIS BARNARD, JR., aka "Barney", located at 6845 Northeast Going Street, Portland, Multnomah County, Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", gave Michael John Allie two (2) suitcases containing cocaine in false compartments and instructed Allie to store

them at Allie's residence located at 13228 Northeast Eugene Street, Portland, Multnomah County, Oregon. Later, at the direction of CHAVEZ, Allie delivered one (1) suitcase to BARNARD at his residence and the other suitcase to James Worthy Calcagno and JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", at the residence of Calcagno, located at 2508 Lake Road, Milwaukie, Clackamas County, Oregon.

34. In approximately August 1982, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", Kevin John Link, and Dorothy Faye Bergquist met at the River Queen Restaurant, located at 1300 Northwest Front Avenue, Portland, Multnomah County, Oregon, to discuss problems in the distribution of proceeds from the distribution of cocaine.

35. In approximately August 1982, JAMES FRANCIS BARNARD, JR., aka "Barney", directed Kevin John Link to remove a hydraulic press used for the processing of cocaine from the residence of Dorothy Faye Bergquist, located at 3504 Northeast 25th, Portland, Multnomah County, Oregon, and place it at Link's residence located at 2804 North Winchell, Portland, Multnomah County, Oregon.

36. In approximately August 1982, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Thomas L. Allie and Cindy Renee Burnett to drive to the residence of JERRY RUTH in the Western District of Washington, and receive money, the proceeds of cocaine distribution, and deliver it to CHAVEZ at "The Book Store" located at 4 Northwest Fourth Avenue, Portland, Multnomah County, Oregon.

37. In approximately August 1982, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", and JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", hired Kevin John Link to create and maintain an accounting system to record the transactions of their cocaine business.

38. During the period from approximately August 1982, through March 25, 1983, Kevin John Link made entries in his accounting books based on information provided to him or within his own knowledge.

39. Beginning in approximately October 1982, the exact date to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", and JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Kevin John Link to store, weigh, dilute, package and distribute cocaine.

40. In approximately September 1982, the exact date to the Grand Jury unknown, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Thomas L. Allie to transport cocaine received from Kevin John Link at ABC Machine, located at 5765 Northeast Columbia Boulevard, Portland, Multnomah County, Oregon, to MICHAEL DORY GOGAN in the Western District of Washington, and return approximately \$10,000, which was delivered to CHAVEZ at "The Book Store" located at 4 Northwest Fourth Avenue, Portland, Multnomah County, Oregon.

41. In approximately November 1982, the exact date to the Grand Jury unknown, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", gave Kevin John Link a quantity of cocaine at the residence of JULIO RODOLFO

MORCHIO-GODOY, aka Julio Morchio, located at 5250 Southwest Landing Drive, Apartment No. 110, Portland, Multnomah County, Oregon.

42. On approximately November 30, 1982, or December 1, 1982, the exact date to the Grand Jury unknown, Gerald Francis Hungerford met with JAMES FRANCIS BARNARD, JR., aka "Barney", and JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", at ABC Machine, located at 5765 Northeast Columbia Boulevard, Portland, Multnomah County, Oregon, and received money and instructions to travel to Peru with Winifred Ellen Gray.

43. On approximately December 1, 1982, Gerald Francis Hungerford and Winifred Ellen Gray traveled from Portland, Multnomah County, Oregon, to Lima, Peru, where they remained until December 22, 1982, and where they met JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio, JAIME ALFREDO SANTOS-CHACON,

aka Jaime Santos, aka "Chino", DIEGO HORACIO ROMANI-JIMINEZ, aka Diego Romani and others unknown and delivered cashier's checks and received cocaine.

44. On December 22, 1982, Gerald Francis Hungerford and Winifred Ellen Gray left Lima, Peru, with cocaine hidden on their persons.

45. During the period from approximately December 25, 1982, through September 1983, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", caused money to be delivered on behalf of Gerald Francis Hungerford and Winifred Ellen Gray, to Mexico City, where they were in jail.

46. During the period from approximately January 1983, through March 1983, the exact dates to the Grand Jury unknown, JAMES FRANCIS BARNARD, JR., aka "Barney", distributed cocaine and caused cocaine to be

distributed to Mark Allen Rooks in the District of Oregon and the Western District of Washington.

47. On January 10, February 24, and March 2, 1983, JAMES FRANCIS BARNARD, JR., aka "Barney", caused Kevin John Link to transport a quantity of cocaine to the Western District of Washington and distribute it to JERRY RUTH.

48. On February 1, 1983, JAMES FRANCIS BARNARD, JR., aka "Barney", and Cindy Renee Burnett traveled from Portland, Multnomah County, Oregon, to Long Beach, California, with BARNARD in possession of cocaine and for the purpose of BARNARD distributing cocaine in the Central District of California.

49. On February 17, 1983, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", distributed a quantity of cocaine to Kevin John Link at the residence of JULIO RODOLFO

MORCHIO-GODOY, aka Julio Morchio, located at 5250 Southwest Landing Drive, Apartment 110, Portland, Multnomah County, Oregon.

50. On February 17, 1983, through March 25, 1983, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", caused Kevin John Link to possess a quantity of cocaine at his residence located at 55 Northeast 192nd, Portland, Multnomah County, Oregon.

51. On March 25, 1983, JAMES FRANCIS BARNARD, JR., aka "Barney", possessed cocaine at his residence located at 11100 Northeast Morris, Portland, Multnomah County, Oregon.

52. During the period from approximately March 25, 1983, through March 28, 1984, JAMES FRANCIS BARNARD, JR., aka "Barney" and JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", requested various co-conspirators to withhold information from the Grand Jury.

All in violation of 21 U.S.C. 846.

COUNT 2

That on or about December 1980, the exact date to the Grand Jury unknown, at 133 S.E. 27th Avenue, Portland, Multnomah County, Oregon, in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 3

That on or about March through April 1981, the exact date to the Grand Jury unknown, at 1415 S.E. Union Avenue, Portland, Multnomah County, Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", and JAMES FRANCIS BARNARD, JR., aka "Barney", defendants herein, did knowingly and

intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 4

That on or about April 19 and 20, 1981, at S.E. 82nd and King Road, Portland, Clackamas County, Oregon, in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 5

That on or about June 1981, the exact date to the Grand Jury unknown, at Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", DIEGO HORACIO ROMANI-JIMINEZ, aka Diego Romani, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 6

That on or about June 1981, the exact date to the Grand Jury unknown, at 6845 N.E. Going Street, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES

FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 7

That on or about June 17, 1981, at Portland, Multnomah County, Oregon, ~~in~~ the District of Oregon, and at other places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", and MICHAEL GEORGE PALMER, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 8

That from approximately August 18, 1981, through August 19, 1981, at the Pepper Tree Motel near Highway 217 and Allen Boulevard, Beaverton, Washington County, Oregon, in the District of Oregon, and at other places in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 9

That on or about November 10, 1981, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JERRY RUTH, defendant herein, did knowingly and

intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 10

That on or about December 1981, the exact date to the Grand Jury unknown, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JERRY RUTH, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 11

That on or about May 1982, the exact date to the Grand Jury unknown, at 1300 N.W. Front Avenue, Portland, Multnomah County, Oregon, in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 12

That on or about May 1982, the exact date to the Grand Jury unknown, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and

intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 13

That on or about June 6, 1982, at 6845 N.E. Going Street, Portland, Multnomah County, Oregon, in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 14

That on or about June 7, 1982, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL DORY GOGAN, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 15

That on or about July 2, 1982, Portland, Multnomah County, Oregon, in the District of Oregon, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendant herein, did knowingly and intentionally distribute a

quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 16

That on or about August 1982, the exact date to the Grand Jury unknown, at Portland, Multnomah County, Oregon, in the District of Oregon, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 17

That on or about September 3, 1982, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL DORY

GOGAN, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 18

That on or about September 10, 1982, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL DORY GOGAN, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 19

That on or about November 18, 1982, at 5250 S.W. Landing Drive, Apartment 110, Portland, Multnomah County, Oregon, in the District of Oregon, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 20

That from on or about November 15, 1982, the exact date to the Grand Jury unknown, to on or about December 22, 1982, in the District of Oregon, and at various other places inside and outside the United States, JAMES FRANCIS BARNARD, JR., aka "Barney", JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez,

aka "Pepe", JULIO RODOLFO MORCHIO-GODOY, aka Julio Morchio, DIEGO HORACIO ROMANI-JIMINEZ, aka Diego Romani, and JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendants herein, did attempt to import a quantity of cocaine, a Schedule II narcotic drug controlled substance, into the United States from a place outside thereof, in violation of 21 U.S.C. 952(a), 963 and 18 U.S.C. 2.

COUNT 21

That on or about December 23, 1982, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL DORY GOGAN, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule

II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 22

That on or about January or February of 1983, the exact date to the Grand Jury unknown, near the McDonald's Restaurant located at 2875 S.E. Powell Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1).

COUNT 23

That on or about January 10, 1983, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", and JERRY RUTH, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 24

That on or about January 18, 1983, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL DORY GOGAN, defendant herein, did knowingly and intentionally possess with intent to

distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 25

That on or about January 28, 1983, at 55 N.E. 192nd Avenue, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 26

That on or about January 28, 1983, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", and MICHAEL GEORGE PALMER, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 27

That on or about February 1, 1983, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and

intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 28

That on or about February 5, 1983, at 5765 N.E. Columbia Boulevard, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 29

That on or about February 17, 1983, at 5250 S.W. Landing Drive, Apartment 110, Portland, Multnomah County, Oregon, in the District of Oregon, JAIME ALFREDO SANTOS-CHACON, aka Jaime Santos, aka "Chino", defendant herein, did knowingly and intentionally distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 30

That on or about February 17, 1983, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, MICHAEL GEORGE PALMER, defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a

Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 31

That on or about February 24, 1983, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", and JERRY RUTH, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 32

That on or about March 2, 1983, at Portland, Multnomah County, Oregon, in the District of Oregon, and at other places outside the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", and JERRY RUTH, defendants herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 33

That on or about March 25, 1983, at the residence located at 55 N.E. 192nd, Portland, Multnomah County, Oregon, in the District of Oregon, JOSE CARLOS CHAVEZ-VERNAZA, aka Jose Chavez, aka "Pepe", defendants herein, did knowingly and intentionally possess with

intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

COUNT 34

That on or about March 25, 1983, at the residence located at 11100 N.E. Morris, Portland, Multnomah County, Oregon, in the District of Oregon, JAMES FRANCIS BARNARD, JR., aka "Barney", defendant herein, did knowingly and intentionally possess with intent to distribute a quantity of cocaine, a Schedule II narcotic drug controlled substance, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2.

A-71

DATED this 18th day of April, 1984.

/s/ M.C. Nicholas

FOREPERSON

CHARLES H. TURNER
United States Attorney

/s/ Kenneth C. Bauman

KENNETH C. BAUMAN
Assistant United States Attorney





A-72

APPENDIX F

TAPED CONVERSATION*

BETWEEN

CAROLYN PINGATORE HOLMES (SRE830017)

AND

JAMES (JERRY) ARNOLD RUTH

April 11, 1983

9:15 p.m.

*NOTE: The entire transcript is 164 pages in length. Petitioner has reproduced relevant portions of the transcript in the Appendix rather than the entire transcript. Page references in parenthesis relate to the page in the Excerpt of Record where the conversation can be found.

A-73

SRE830017: That's neat.

RUTH: Uh-huh. 14 carat. Nice, huh?

Is Pat comeing, going to come?

SRE830017: Yes. That's why I sat here.

RUTH: Oh, yeah. (ER 518).

SRE830017: Well, will they put a, like a plastic cap in there or something?

RUTH: No they won't.

SRE830017: Isn't that weird?

RUTH: They say that that causes a lot of problems He's better off without the cap. The knee - - it's a big joint, exposed -- real easy. Won't be on your hands and knees. No more playing froggy.

SRE830017: That means she hasn't been (inaudible) arrested for (inaudible). That's a bunch of crock.

RUTH: I was going to say, shift to the missionary position? Fuck I kind of liked it.

A-74

RUTH: How ya doing?

SRE830017: What have you got your gloves for?

RUTH: It's cold outside.

SRE830017: It is cold outside.

RUTH: Fuck it's winter.

SRE830017: You only had to walk seven miles from the parking lot to here.

RUTH: I parked right in front.

SRE830017: To this?

RUTH: (Inaudible)

SRE830017: Did you put a VIP sticker on your car?

RUTH: Naw, I just parked it out there. I got my ElDorado so I though fuck that sucker.

SRE830017: You never know. Anyone with VIP stickers or press . . .

RUTH: Fuck

SRE830017: Where did you get this?

RUTH: I had it made.

SRE830017: Did I ask you my joke about
-- my Easter joke?

RUTH: No.

SRE830017: I was going to call you. I
was trying to get ahold of you.

Do you know why the Easter bunny hides
his eggs?

RUTH: No. I read dirty jokes. I
mean --

SRE830017: He doesn't want - - yeah, it
is dirty.

RUTH: Huh? What?

SRE830017: You might know the answer.

Do you know why the Easter bunny hides
his eggs?

Well, don't tell him.

She knows.

RUTH: Why.

SRE830017: She doesn't -- he doesn't
want anyone to know he's screwing a chicken.

RUTH: He gets his eggs, huh.

(ER 524-525).

SRE830017: What are your girlfriends doing tonight?

RUTH: Joyce works 8:00 till 8:00 tonight.

SRE830017: The only ones I know about is Joyce and Terry. (Inaudible) If I just juggle those two carefully I'm doing fine.

RUTH: I always have more than that.

SRE830017: What happened to the one that was -- I know. Do I know! What happened to the one you had over in -- east of the mountains, you know?

RUTH: Oh, Karen Brown?

SRE830017: Yeah, what happened to her?

RUTH: She's been around a couple of times, but (inaudible)

SRE830017: Did she get a divorce and stuff?

A-77

RUTH: Yeah, she did. Had some troubles that I couldn't understand.

SRE830017: Too slow or --

RUTH: No, she's bubblegum. I mean, she's a -- after she got her divorce she went back to, you know, had her hair cut, you know a little clump of stuff running around. Really bubblegummed out.

SRE830017: Can't stand that (inaudible) stuff.

RUTH: She's kind of a cute body. Not really. (inaudible) She's okay.

SRE830017: She's just hot on your trail. You like that.

RUTH: Yeah, she's a good (inaudible). Having a young girl like you is kind of flattering for a while but eventually, oh, E.T. (ER 526-527).

A-78

SRE830017: And underneath is a health spa kind of thing, you know. You can go get your massage and that shit.

RUTH: Justs over there?

SRE830017: Uh-huh. It's out that way.

RUTH: Look at all those people there a minute ago.

SRE830017: Those chicks down there? You've fucked everbody in Seattle, I swear to God.

RUTH: Thank you.

SRE830017: Do you have Herpes?

RUTH: No, I don't.

SRE830017: God, how do you know? It just hasn't hit, yet. That's a thing I was worrying about.

RUTH: When you have Herpes, you know.

SRE830017: Do you?

RUTH: Of course you do. Sores all over your fucking dick (inaudible).

SRE830017: Well, I don't have one of those and they have never really explained this to me so I can figure it out, but I must not have it.

RUTH: Yeah, Herpes is an open sore.
(ER 568).

SRE830017: This chick is nice. You wouldn't turn her down.

RUTH: This is a nice one.

SRE830017: You like blondes, anyway, don't you?

RUTH: Not especially. I like -- prefer dark-haired girls, actually. All my girlfriends (inaudible)

SRE830017: Half and half, I'd say. you like tall ones, short ones, young ones, old ones. You got a little of everything. Are you ever going to get married?

RUTH: Not right now.

SRE830017: What are you going to do with Joyce?

RUTH: I don't know. Kill her ass bury her, put her parts in the woods.

SRE830017: No. Don't say that. You know, I mean that chick, that's what she's waiting for. What are you going to do with her?

RUTH: I don't know. She's such a bitch. You know, Joyce waits on me a lot. (ER 581).

RUTH: I am perty good to her Joyce. I'm the best boyfriend she's ever had. The best looking.

SRE830017: She's picked some pretty bum bull shit then.

RUTH: Yeah yeah. They're a bunch of losers.

SRE830017: I mean you're a nice guy.

RUTH: Yeah, I am, you know.

SRE830017: Pat and I both said -- this is exactly what we said, you know, the two of us married old ladies, the whole thing, you know. Only you had Pat when she wasn't married.

RUTH: Yeah.

SRE830017: But both of us said that when you were really low, the one person to call, the number to remember is Jerry's. And he'll make you laugh and if yah know. And it's the truth, you know. When -- it doesn't really matter, you just want a laugh, call Jerry Ruth for a good joke.

RUTH: Happiness. A pleasure. (ER 584).

SRE830017: I'd rather be your friend, anyway.

RUTH: I think that most of the girls I had affairs with, like you, end up being my friends, you know. They're not bothering me. I kind of dealt them out of that bed thing.

SRE830017: You do that pretty good.

RUTH: Without making everybody mad at me, you know. That's the same way I did and Pat was like that too.

SRE830017: Well, I can't say that Pat and I, both of us there -- I think we both felt a moment or a time of rejection, but I think we both cared a lot about you and felt like --

RUTH: I always dumped you -- I always dump you on your head a little bit not to bad and you.

SRE830017: Yeah, you did. No you were real nice about it, but --

RUTH: There aren't very many guys that you like and stopped sleeping with you and you still liked (inaudible)

SRE830017: First of all, for a married woman -- now, in Pat's case on the verge of a divorce; in my case not in that situation, okay? For a married woman to do what we did in the first place.

RUTH: Yeah. I'm a good lover.

SRE830017: It meant that -- well, yeah.

RUTH: I am.

SRE830017: There's no doubt about it.

RUTH: I am a good lover. I know a lot about girls.

SRE830017: Well, besides that you have a lot of personality and you make a person feel really good, and you make us laugh.

RUTH: It helps.

SRE830017: It's the whole combination.

RUTH: It's hard not to sleep with them when they make you laugh.

SRE830017: We were laughing one time, the whole time we were screwing --

RUTH: (Inaudible). That's (inaudible).

SRE830017: Laughing and screwing.

RUTH: This sucker's undressing me and I'm laughing about it. I hate it.

SRE830017: It's been a long time since I've laughed and screwed.

RUTH: I'll tell you, the humor --
(ER 585-587).

RUTH: I am more loyal than anybody. I always call back. And I never, you know -- that my friends that I don't have now are ones that rejected me, like Cromwell. (Inaudible) Not that I...

SRE830017: Strange, isn't it? I still don't understand that.

RUTH: Yeah, I don't need him.

SRE830017: Scary, really, 'cause you were so close when I was around you, you were so close to him that -

RUTH: He was my best friend.

SRE830017: That's -- to me -- I never understood -- I still don't understand that. But he's kind of a strange guy, so I guess you have to take it with the territory a little bit.

RUTH: Wimp.

SRE830017: What did you call him, a wimp?

RUTH: Yeah. Yeah, man, anybody that doesn't --

SRE830017: Didn't you tell me he got married?

RUTH: I mean -- no. No. He'd like to marry. Anybody that doesn't think more of his friends that to do that to them is fucking junk. I mean, if that girl meant so much that he wouldn't ever call me up on the phone for a year, fuck his ass. You know, fuck him. I mean, what a chicken shit way to be. I've got better friends than that. A lot of my friends are girls.

SRE830017: Yeah. I think because --

RUTH: I spend a lot of time with them.

SRE830017: -- you trained them so well.

RUTH: Yeah, I spend a lot of time with them. I spend a lot of time working on -- on these relationships with these girls. You know, with Terry and Joyce and you and all of them. I spend a -- (ER 587-588).

RUTH: No. No, you wouldn't tell him you slept with me.

SRE830017: It'd kill him.

RUTH: He wouldn't (inaudible). 'Cause we -- you and I slept together so little, and we got away from that and had a good friendship.

SRE830017: Yeah. I wish I --

RUTH: I don't think -- I think you could leave it out and Terry wouldn't know it. He'd never need to know it? Would you --

SRE830017: It would kill him. It would just kill him.

RUTH: Well, I wouldn't tell him that then. He's a nice guy. We don't want to hurt him. As soon as I met Terry, and I was screwing and you were working for me doing my books, I decided not to screw you then.

SRE830017: I know. They day you hit me on the head.

RUTH: Yeah.

SRE830017: The first time you found out I was with somebody else you hit me on the head and that was it.

RUTH: That's right. (ER 595).

SRE830017: I ain't (inaudible). I'll tell you what if that ever comes out, if they ever said, "Carolyn Holmes (phonetic), did you fuck Terry?" I'd say, "Bull shit, I didn't even give him a blow job."

RUTH: Yeah, right. That's right.

SRE830017: I mean that's exactly what I'm going to -- I mean I may not perjure myself on some things, but I'm certainly going to one that.

RUTH: Well, that's a (inaudible) about your freedom to.

SRE830017: Well, I'm not going to -- there's no way I'm going to jail for fucking you.

RUTH: Well, that's (inaudible).

SRE830017: This whole fucking you is what got me in trouble. (ER 601-602).

RUTH: Yeah.

SRE830017: And he went after her hard.

RUTH: Too late.

SRE830017: It was too late. And (inaudible) that Billy was kinky, and Nate's not.

RUTH: Yeah, that helps.

A-89

SRE830017: Well, Billy's into kinky stuff, you know. Well, I mean he's into vibrators and porno movies and, you know --

RUTH: Yeah. She likes that.

SRE830017: And, you know, she's weird. I know. She blew me away.

RUTH: You know what's wrong with Pat? She's not satisfied with sex yet. She (inaudible)

SRE830017: Oh, I just like a variety. I want my sex. She is weird. But Billy is weird.

RUTH: No. she's not. No, she's not. She just (inaudible) to be happy is all. (ER 608).

RUTH: Everybody laughs at me.

SRE830017: You're funny. You're just funny.

RUTH: I am. In the face of adversity I'm funny.

SRE830017: I like you in the morning when you'd come over and you'd only have your shirt on and no underwear, and you're talking on the phone like an old lady with your feet on the register trying to keep warm and watching the 16-year-olds go to school.

RUTH: I don't get up that early. Lately I been up really in the the mornings, I've been watching those females. Normally I don't. (ER 612).

RUTH: I've had affairs with about four or five married girls, recently.

SRE830017: Is that all? Yeah, recent, this year, not counting me and Pat.

RUTH: Pat wasn't married.

SRE830017: You screwed Pat while she was still married. (ER 617).

RUTH: I screwed her when she was single first.

SRE830017: I know, but you kept on going when she was married.

RUTH: Yeah.

SRE830017: Why did she ever marry that idiot? I don't know what she's -- he is a dork.

RUTH: Pat would have been vulnerable. I could have chased her and had her had I felt like being that way. She like me as well as him, and she was vulnerable to that, you know, and Dave just pressured her.

SRE830017: When he was out for (inaudible)

RUTH: Mean to her. Fucked her in the office and all that shit, you know. She wasn't even that good in bed, you know.

SRE830017: You made it so special, though; you were so nice. (ER 618)

RUTH: I like to -- I like to think that the girls that I had affairs with or slept with were (inaudible). All of them, you know, smile when they think about me.

SRE830017: That, too.

RUTH: You know, that, too, you know.

SRE830017: We were real uncomfortable for a long time because she would -- she didn't want to say that she did.

RUTH: That I screwed both of you, you mean?

SRE830017: Yeah, it bothered her. Me, I knew it. I knew it because you introduced me, "This is my other married friend." This is the way you -- and I knew right off the bat, well you've been poking her for -- how long and when did you start.

RUTH: You guys -- Judy, that broker's wife, she was a push-over. I mean, you guys are easy. You guys are, you know, kind of independent individuals, you know, you did

what you thought -- Judy was a complete (inaudible), you know, married and -- whew, wiped her right out. (ER 619)

RUTH: Yeah, she is, 'cause you know her personality. She's not gorgeous, she's not a beautiful woman.

SRE830017: You know what, she drove Terry nuts when she lived at our houseboat three or four months -- she lived there.

RUTH: He liked her, huh?

SRE830017: Oh, God. She'd get up in the morning and make coffee in a T-shirt with nothing underneath it.

RUTH: She has nice tits.

SRE830017: Poor Terry's going (inaudible). Of course, he'd say to me in the morning, "Don't you leave till after I leave." Shit, I'd say, "Okay, Homer, whatever you need." He goes, "Because - 'cause I can't control myslef. If you leave,

it's -- whatever happens, the repercussions are your own fault." And I'd say, "Okay, Homer." (ER 624)

RUTH: Go ahead and act like it , I mean really.

SRE830017: You have a nice ass.

RUTH: My legs are nice. (Inaudible). They are. (Inaudible) got thighs.

SRE830017: What are you, 32's again, 31's?

RUTH: I think these are 33's.

SRE830017: And 25-inch thighs.

RUTH: Nice, huh? (Inaudible)

SRE830017: I better go home before you start playing that song, 'Do It To Me One More Time.' (ER 639)

RUTH: I mean, what does that mean? You mean I have to fuck and keep some old bag because I'm going to be 60 eventually?

SRE830017: No. But, Jerry, she doesn't screw like -- what -- who cares? You want another bubblegummer ass hole jerk.

RUTH: I can have one.

SRE830017: Big deal. Want one?

RUTH: Not a bad idea.

SRE830017: Jerry, they don't -- they can't relate to anything.

RUTH: I'm trying to come up with a really young one that fucks like a mink.

SRE830017: Who cares? Who cares?

RUTH: Just me.

SRE830017: Naw, I don't believe that.

RUTH: Yeah, I want a really cute one, that's stimulating, interested in me, beautiful, young, and fucks like a mink. (ER 641-642)

RUTH: Some of the girls from the herd --

SRE830017: Do you ever have more than five at a time? Never.

RUTH: Five girlfriends?

SRE830017: You're not -- wait a minute.

RUTH: Yeah, I did have five girlfriends.

SRE830017: Since I've know you you've had Terry and Joyce. You've had Terry and Joyce since I met you. You've had Terry and Joyce since me and Pat met you.

RUTH: Well, but Terry and Joyce were steady girlfriends.

SRE830017: Terry and Joyce count. Okay. Then you always have about three. You have an athletic one, you have a dumb total air-head one, and you have one that maybe fits somewhere in between. A pretty girl.

RUTH: Yeah, I suppose.

SRE830017: Oh, I don't think so.

RUTH: The air-head (inaudible).

SRE830017: I think there is.

RUTH: I'm taking (inaudible) Terry and Joyce.

SRE830017: That's 'cause all the rest of them are on the rag.

RUTH: (Inaudible). Right now they're all on the rag. I did give them a week off. They hate that. God, they hat that. (ER 644-645).

SRE830017: So what's going to happen if they bring you down?

RUTH: If they send me to court (inaudible)? I'm going to fight their ass every inch of the way. (ER 669).